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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Columbia

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

The American Civil Liberties Union submits this brief as *amicus curiae* in support of the judgment of the United States District Court for the District of Columbia declaring that 26 U.S.C. § 9012(f) is an unconstitutional abridgment of the freedoms of speech and association safeguarded by the First Amendment.

INTEREST OF *AMICUS CURIAE* [1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit organization with more than 200,000 members. For more than sixty years, the ACLU has been dedicated

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[1] Letters from attorneys for each of the parties consenting to the filing of this *amicus* brief have been submitted to the Clerk of the Court.

to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has long been an active participant in litigation involving the constitutionality and interpretation of the federal election laws. The ACLU participated in two of the early cases involving the Federal Election Campaign Act of 1971—*United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972), and *ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975).

The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976), the landmark challenge to the constitutionality of the 1974 amendments to the Federal Election Campaign Act and the Presidential Election Campaign Fund Act. Recently, the ACLU served as counsel for two of the defendants in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980)(*en banc*), involving reporting and disclosure requirements of the Federal Election Campaign Act, and participated as *amicus curiae* in *California Medical Association v. Federal Election Commission*, No. 79-1952 (U.S. June 26, 1981), involving limitations on contributions to political committees adopted by Congress subsequent to this Court's decision in *Buckley v. Valeo*.

The American Civil Liberties Union Fund of the National Capital Area, the Washington area litigation branch of the ACLU, participated as *amicus curiae* in the district court in these consolidated cases on the issue of the constitutionality of the $1,000 limitation on independent expenditures imposed by 26 U.S.C. § 9012(f)—the principal question presented by these consolidated appeals.[2]

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[2] *Amicus* takes no position on and does not address the question presented in the brief of intervenor-appellee Federal Election Commission in No. 80-847 regarding the propriety of Common Cause's appeal or its attempt to bring suit under 26 U.S.C. § 9011(b).

SUMMARY OF ARGUMENT

The statutory provision at issue in these appeals, 26 U.S.C. § 9012(f), makes it a crime for any group to spend more than $1,000 on independent advocacy of presidential candidates who have chosen to accept federal financing for their campaigns. This provision has the practical effect of barring any effective independent group political expression in support of major party candidates for our nation's highest office. Like the $1,000 limitation on independent political expenditures ruled unconstitutional by this Court in *Buckley v. Valeo, supra,* section 9012(f) directly and drastically restricts the exercise of fundamental First Amendment freedoms of political speech and association.

Section 9012(f)'s abridgment of these basic freedoms cannot survive the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley v. Valeo, supra,* 424 U.S. at 44-45. Each of the governmental interests asserted by appellants in an effort to sustain section 9012(f)'s expenditure limitation—preservation of the integrity of public financing provisions of the Presidential Election Campaign Fund Act and elimination of corruption and the appearance of corruption in presidential campaigns—has been considered and rejected as inadequate to justify direct limits on political expression. *See Buckley v. Valeo, supra,* 424 U.S. at 39-59; *Republican National Committee v. Federal Election Commission,* 487 F. Supp. 280, 285-286 (S.D.N.Y.) (three-judge court), *aff'd mem.,* 445 U.S. 955 (1980).

The limiting construction of section 9012(f) proffered by appellants is wholly insufficient to save the statute from invalidation. The construction advanced by appellants, which would exempt an ill-defined class of small, informal groups from section 9012(f)'s draconian expenditure ceiling, involves a wholesale rewriting of the provision that conflicts with the language employed by Congress and the authoritative administrative interpretation of the section by appellant Federal Election Commission. Appellants' ill-conceived salvage effort simply adds to section 9012(f)'s constitutional infirmities by

engrafting a hopefully vague standard to its criminal prohibition without alleviating section 9012(f)'s intolerable restriction of core First Amendment freedoms of speech and association.

ARGUMENT

I. SECTION 9012(f) IMPERMISSIBLY BURDENS FUNDAMENTAL FIRST AMENDMENT FREEDOMS.

Section 9012(f) makes it a crime for any nonauthorized political committee to expend more than $1,000 to further the election of a presidential candidate who has chosen to receive federal funding for his own campaign.[3] Section 9012(f)(3) threatens the individuals who are involved in this offense with imprisonment for up to a year, plus a stiff fine. This stringent prohibition on political expression applies to any "nonauthorized" political committee—a concept that sweeps in any group of persons that wants to influence the electorate, but has not been authorized in writing by the candidate to incur expenses to further his election. *See* 26 U.S.C. §§ 9002(1),(9); 11 C.F.R. §§ 100.5, 9002.9 (1981).[4]

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[3] Section 9012(f)(1) states in pertinent part:

> "[I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000."

[4] Section 9002(9) defines "political committee" to mean:

> "*any* committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." (Emphasis added).

Regulations adopted by appellant Federal Election Commission define "political committee" for purposes of section 9012(f) as "*any* committee, club, association, or *other group of persons* which receives contributions aggregating in excess of $1,000 or which makes expenditures in excess of $1,000 during a calendar year." 11 C.F.R. § 100.5 (1981)(emphasis added), incorporated in 11 C.F.R. § 9002.9 (1981). The scope of the term "political committee" is discussed at greater length in part II.A of this brief.

Section 9002(1) defines "authorized committee" to mean:

> "with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates . . . ."

As with the limitations on independent expenditures struck down in *Buckley*, section 9012(f) directly and severely restricts the exercise of fundamental freedoms of speech and association—freedoms that have their "'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo, supra,* 424 U.S. at 15, *quoting Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971). Since the drastic curtailment of basic First Amendment freedoms produced by section 9012(f) does not serve any compelling governmental interest, section 9012(f) is unconstitutional on its face.

A. Section 9012(f) Severely Restricts Freedom Of Speech And Association In Presidential Campaigns.

In *Buckley v. Valeo, supra,* this Court examined a wide array of contribution and expenditure limitations enacted by Congress as part of the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263. The Court concluded that, although the "contribution and expenditure limitations both implicate fundamental First Amendment interests," the "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." 424 U.S. at 23. The Court's lengthy analysis of expenditure limitations similar to the one at issue here, particularly the $1,000 limit on independent expenditures, is controlling in this case.

This Court emphasized in *Buckley* that the various expenditure limitations contained in the Federal Election Campaign Act ("Campaign Act") posed "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. The practical link between political expenditures and political advocacy in modern American society could not be stronger. As the Court recognized, "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* at 19. Thus, a "restriction on the amount of money a person or group can spend on political communication during a campaign *necessarily* reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* (emphasis added).

Applying constitutional principles to these realities of political life, the Court forcefully concluded:

> "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—*individually as citizens and candidates and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* at 57 (emphasis added).

The most debilitating of the expenditure limitations addressed by the Court in *Buckley* was the $1,000 ceiling then imposed by 18 U.S.C. § 608(e)(1) on independent expenditures in support of any candidate for federal office. This limit on independent expenditures severely restricted political expression by excluding "all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." 424 U.S. at 19-20. By stifling political expression by groups, section 608(e)(1) also had a devastating effect on the fundamental right of association. The $1,000 limit on independent expenditures threatened to end any meaningful exercise of associational freedoms in federal election campaigns by precluding "associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Id.* at 22. Accordingly, the Court declared section 608(e)(1) unconstitutional. *Id.* at 51.

The statutory provision at issue in this case, 26 U.S.C. §9012(f), imposes restrictions on First Amendment freedoms of speech and association that are virtually identical to those that prompted this Court to invalidate section 608(e)(1). Section 9012(f), a part of the Presidential Election Campaign Fund Act (the "Fund Act"), prohibits any non-authorized

political committee—defined broadly by Congress and the Federal Election Commission to encompass any committee, association, organization, or other group of persons—from making independent expenditures in excess of $1,000 to further the election of a presidential candidate who has chosen to receive federal funding for his own campaign.[5]

It would be hard to imagine a tighter noose on the neck of vital constitutional guarantees than the constraint on independent expenditures imposed by section 9012(f). Even in January 1976, when this Court decided *Buckley*, its $1,000 expenditure ceiling would have precluded political committees from taking out a single quarter-page advertisement in virtually any metropolitan newspaper in the country. *See Buckley v. Valeo, supra,* 424 U.S. at 40.[6] As a practical matter, section

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[5] Section 9012(f) applies only to independent expenditures by groups. It does not reach expenditures made at the direction of or in coordination with the candidate or the candidate's official campaign. Such coordinated expenditures are treated as contributions and, as such, are prohibited absolutely by other provisions of the Fund Act in the case of presidential candidates who have chosen to accept federal funding. 26 U.S.C. §§ 9003(b)(2), 9012(b); 11 C.F.R. § 9002.13 (1981); *see Buckley v. Valeo, supra,* 424 U.S. at 46-47 n.53.

Common Cause, although acknowledging that this appeal only addresses the right of appellees to make independent expenditures (Common Cause Br. at 10 n.19), persists in suggesting through repeated references in its brief to "independent"committees (Common Cause Br. at 21, 27, 28, 29, 30, 31, 32) that appellees do not in fact operate independently of the candidates they support. This factual issue, on which *amicus* takes no position, has no relevance to these appeals which concern the constitutionality of section 9012(f)'s ceiling on independent expenditures.

[6] The Fund Act includes provisions that automatically increase the amount of federal financing provided to eligible presidential candidates to adjust for increases in the consumer price index. 26 U.S.C. §§ 9004, 9008; *see* 2 U.S.C. § 441a(c). Section 9012(f)'s $1,000 ceiling, however, does not increase with inflation. This $1,000 limit already has been more than cut in half by inflation since it was enacted by Congress in 1971. *See Economic Report of the President,* Table B-52 (1981). Today, the $1,000 ceiling imposed by section 9012(f) limits political committees to *less than half* the amount required to purchase a single *one-eighth page* advertisement in the *Washington Post.* In the years ahead, the corrosive impact of inflation will shrink still further the amount of group political expression permitted by section 9012(f).

9012(f) is equivalent to a total ban on any independent group electioneering in support of presidential candidates who accept public funding.

While section 9012(f) does not restrict independent expenditures by individuals, this limitation does little to mitigate the provision's drastic curtailment of political expression and association. As this Court emphasized in *Buckley*, the "electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19. Only a tiny fraction of Americans can afford, as individuals, to utilize the expensive means of communication that are essential to effective political advocacy. The great majority of citizens can participate effectively in our nation's political dialogue only by banding together to pool their resources in order to communicate through political associations. As the three-judge district court emphasized in this case, "[i]f section 9012(f) were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force." Common Cause J.S. App. at 22a.[7]

Appellants turn the First Amendment on end when they highlight the growth in group political expression fostered by political committees as a reason for sustaining section 9012(f). Although appellants rail against the emergence of vocal, active political groups, this is a constitutionally protected phenomenon. These groups are simply an increasingly important component of the wide-open debate and the free marketplace of ideas that the First Amendment was intended to nurture.

The figures cited by appellants actually serve to document the drastic curtailment of the quantity and diversity of political

[7] Citations in the form "Common Cause J.S. App.," "Common Cause J.S.," and "FEC J.S." refer, respectively, to the appendices to the jurisdictional statement filed by appellant Common Cause, the jurisdictional statement filed by Common Cause, and the jurisdictional statement filed by appellant Federal Election Commission. Citations to "Common Cause Br." and "FEC Br." refer, respectively, to the brief filed by Common Cause and the brief filed by the Federal Election Commission.

expression that would result if section 9012(f) were upheld.[8] It is precisely this adverse impact of expenditure limitations that this Court in *Buckley* found wholly incompatible with the First Amendment. As the Court emphasized, " 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . .' " 424 U.S. at 14, *quoting Mills v. Alabama,* 384 U.S. 214, 218 (1966). As a result, like other "legislative restrictions on the advocacy of the election or defeat of political candidates," section 9012(f) is "wholly at odds with the guarantees of the First Amendment"—guarantees that reflect "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Buckley v. Valeo, supra,* 424 U.S. at 14, 50, *quoting New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

Appellants distort this Court's decision in *Buckley* and ignore the teachings of other First Amendment decisions in arguing that the effect of section 9012(f) upon speech and associational rights "is, for all substantial purposes, the same as that of the contribution ceilings in *Buckley*" and that the section therefore implicates "only 'marginal' First Amendment interests." Common Cause Br. at 19, 38, *quoting Buckley v. Valeo, supra,* 424 U.S. at 20; *see* FEC Br. at 49-50. The contribution limitations addressed in *Buckley* did not place a ceiling on the amount of money that any individual, candidate, or group could devote to independent advocacy of the election or defeat of candidates. 424 U.S. at 29. Nor did they threaten political expression by preventing "candidates and political committees from amassing the resources necessary for effective advocacy."

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[8] According to appellant Common Cause, "only four individuals made independent expenditures in excess of $5,000 to advocate the election or defeat of Mr. Carter or Mr. Reagan, and the total sums spent by all individuals were smaller by far than the sums spent by appellees." Common Cause Br. at 37 n.61. While the amount of individual expenditures might well increase if independent group expenditures were outlawed, the figures cited by Common Cause underscore the enormous threat that section 9012(f) poses to vigorous debate regarding candidates for our nation's highest office.

(footnote continues)

Id. at 21. By contrast, section 9012(f) precludes any meaningful group expenditures for political expression in support of a presidential candidate who has agreed to receive public funding. It is thus a direct and draconian restraint on the freedom of individual citizens to associate to pursue effective political advocacy and the right of organizations that have legally raised substantial funds to expend those sums in the exercise of their freedom of speech.[9]

Appellants' argument must also be rejected because it rests on an unduly constricted view of the First Amendment guarantee of freedom of speech. Appellants contend that section 9012(f) does not abridge that basic freedom because expenditures by committees for political expression cannot be equated with personal speech by individual contributors. This Court, however, has firmly repudiated the premise underlying appellants' argument—that only the speech of individuals is accorded First Amendment protection.[10] As the Court emphasized in *First National Bank of Boston v. Bellotti,* 435 U.S. 765,

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(footnote continued)

Section 9012(f) not only would dramatically suppress the quantity of political speech available to the electorate, but would drastically limit the sources of information and opinion about candidates to the few entities exempted from section 9012(f)—the institutional press, established political parties, wealthy individuals, and the candidates themselves. *Compare Buckley v. Valeo, supra,* 424 U.S. at 39-40 (discussing the impact of section 608(e)(1)).

[9] This Court recently reaffirmed the important distinction between the impact of limitations on the amounts that individuals and groups may contribute to others and the effect of ceilings on direct political expenditures "made *independently* by a candidate, individual or group." *California Medical Association v. Federal Election Commission,* No. 79-1952, slip op. at 12 (U.S. June 26, 1981) (plurality opinion) (emphasis in original).

Section 9012(f) places no limit on the amount that individuals or groups may contribute to committees, but rather restricts the amount that any group may expend for independent advocacy in support of the presidential candidate of its choice. Section 9012(f), therefore, is a classic expenditure limitation that stifles "the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *Id.* at 13.

[10] Common Cause attempts to wring support for its "personal speech" theory of the First Amendment from a footnote in *Buckley. See* Common Cause Br. at 20-21 n.31, discussing 424 U.S. at 19 n.18. That footnote, in

(footnote continues)

777 (1978), the "inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, *association,* union, or individual." (Emphasis added). The political expression stifled by section 9012(f), to paraphrase *Bellotti,* " is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a [political committee] rather than an individual." *Id.; accord, Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 533 (1980).

B. Section 9012(f) Serves No Compelling Governmental Interest.

Appellants cannot save section 9012(f) merely by insisting that it represents a "reasonable" abridgment of fundamental First Amendment freedoms of speech and association. *See Buckley v. Valeo, supra,* 424 U.S. at 50. Rather, the constitutionality of section 9012(f), like that of the independent expenditure limitation in section 608(e)(1), "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley v. Valeo, supra,* 424 U.S. at 44-45.

This is a test that section 9012(f) cannot possibly survive. Each of the governmental interests advanced by appellants has

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(footnote continued)

which the Court analogized the freedom permitted political expression under the Campaign Act's expenditure limitations to being "free" to drive as far and as often as one desires on a single tank of gasoline, was designed to illustrate the drastic impact of quantity restrictions on freedom of speech. The analogy had nothing whatever to do with whether the source of the expenditures was an individual or a group. A comparable analogy illustrating the impact of section 9012(f)'s expenditure limitation on the freedom of citizens to engage in effective political expression is to the "freedom" to travel by air or sea as far and as often as one desires so long as one pilots his own airplane or captains his own yacht. To continue with this analogy, section 9012(f)'s limitation on group expenditures is comparable to a ban on the ability of ordinary citizens to pool their limited resources in order to charter a bus or an airplane to enable them to exercise effectively their freedom to travel.

been considered and rejected in *Buckley* and subsequent cases as inadequate to sustain limitations on independent expenditures in political campaigns. *See Buckley v. Valeo, supra,* 424 U.S. at 39-59; *Republican National Committee v. Federal Election Commission, supra.* Indeed, as demonstrated below, the arguments advanced by appellants in support of the constitutionality of section 9012(f) are substantially weaker than those rejected as insufficient by this Court in *Buckley.*

1. Preservations of the Integrity of the Fund Act

Appellants contend that section 9012(f) serves a compelling public interest because it is part of the Fund Act's system of public financing of presidential election campaigns which this Court has upheld as consistent with the First Amendment. FEC Br. at 5-6, 33-36; Common Cause Br. at 11, 15. In fact, this Court's decision upholding other public financing provisions in *Buckley* lends no support to the expenditure ceiling imposed by section 9012(f). Moreover, contrary to the assertions of the Federal Election Commission, section 9012(f) is not necessary "to protect the goals of public financing." FEC Br. at 6.

a. Decisions sustaining public financing

In *Buckley,* this Court addressed a variety of challenges to the use of federal funds to finance presidential election campaigns. At issue was the legality of the expenditure of public dollars to facilitate political expression by candidates and the criteria established for determining a candidate's eligibility for public financing. The case did not sustain any limitation of independent political expression by supporters of candidates opting for federal financing. In upholding the basic public financing provisions, the Court stressed that those provisions represented "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. Section 9012(f)—which restrains rather than enlarges public discussion—cannot be sustained simply because it was enacted along with the basic public financing provisions upheld in *Buckley.*

The Federal Election Commission strains to find support for section 9012(f) by claiming that "all challenged expenditure limitations in the context of publicly financed campaigns were upheld" in *Buckley*. FEC Br. at 34. This attempt to draw support from *Buckley* is both misleading and misplaced. The only expenditure limitation connected with public financing that was addressed in *Buckley* was the limitation on campaign spending by presidential candidates who apply for public funding. 26 U.S.C. § 9003(b). Both *Buckley* and the subsequent decision in *Republican National Committee* make clear that this ceiling on the candidate's own spending survives First Amendment scrutiny only because the candidate *voluntarily* chooses to accept the public funding alternative triggering the limitation on his own activities. *Buckley v. Valeo, supra,* 424 U.S. at 57 n.65; *Republican National Committee v. Federal Election Commission, supra,* 487 F. Supp. at 285.

As the *Republican National Committee* case demonstrates, no choice made by the candidate to accept federal funds may constitutionally diminish the rights of his supporters to make independent political expenditures—expenditures that section 9012(f) would make criminal. The court emphasized that regardless of how the candidate exercises his own freedom of choice, the candidate's supporters are left " 'free to engage in independent political expression,' " including "uncoordinated expenditures . . . *without limit.*" 487 F. Supp. at 286, *quoting Buckley v. Valeo, supra,* 424 U.S. at 28 (emphasis added). In short, *Republican National Committee*—a decision only recently and unanimously affirmed by this Court—concluded that the First Amendment precludes any limitations on independent expenditures by supporters of presidential candidates that have opted for public funding. 487 F. Supp. at 286. Thus, far from supporting section 9012(f), the key decisions upholding the Fund Act's public financing scheme demonstrate that section 9012(f)'s $1,000 ceiling on independent expenditures is unconstitutional.

b. The purposes of public financing

Section 9012(f) cannot be upheld as necessary to fulfillment of the goals of public financing. The Fund Act's public financing provisions are intended to accomplish two objectives:

> "[1] to give candidates the opportunity to lessen the 'great drain on [their] time and energies' required by fund-raising 'at the expense of providing competitive debate of the issues for the electorate' and [2] to 'eliminate reliance on large private contributions' and on the implicit obligations to private contributors that may arise from such reliance . . ." *Republican National Committee v. Federal Election Commission, supra,* 487 F. Supp. at 284, *quoting* S. Rep. No. 689, 93d Cong., 2d Sess. 5-6 (1974).

Neither objective can sustain section 9012(f).

Section 9012(f) is entirely unnecessary to accomplish the purpose of relieving candidates of the rigors and diversions of fund-raising. The public financing provision achieved this objective, at least for the presidential candidates of the two major parties, by providing each of them with almost $30 million for the 1980 campaign. The grant of these funds alone made it unnecessary—and, indeed, unlawful—for the candidates to attempt to raise additional contributions to support their campaigns. Both the Fund Act and the Campaign Act limit the candidate's campaign expenditures to the amount he receives through public financing. *See* 26 U.S.C. § 9012 (a); 2 U.S.C. § 441a(b). These provisions, which carry criminal sanctions, render section 9012(f) entirely superfluous to the Fund Act's purpose of relieving candidates from the burdens of fund-raising.

Section 9012(f) is an equally inept means of serving the other purpose of the public financing provisions—elimination of the candidate's reliance on large private contributors. The provision of more than $30 million in public funds coupled with the prohibition on expending sums in excess of that amount will accomplish this objective in future campaigns. Moreover, as the Supreme Court noted in *Buckley,* "[t]he interest in alleviating the corrupting influence of large contributions is served by the [Campaign] Act's contribution limitations and disclosure provisions . . ." 424 U.S. at 55. These limitations, upheld in *Buckley,* restrict contributions by individuals or groups to $1,000. Contributions by corporations or unions are prohibited by other provisions. *See* 2 U.S.C. § 441b.

Appellants assert that section 9012(f) can be upheld as a means of safeguarding against evasion of the Fund Act's prohibition on contributions to presidential candidates who accept federal funding. FEC Br. at 18-20; Common Cause Br. at 30-32. The exact same rationale was advanced in *Buckley* by the defenders of the limitation on independent expenditures imposed by section 608(e)(1). *See* 424 U.S. at 44. The Court's rejection of that rationale is equally applicable here: the "markedly greater burden on basic freedoms caused by §608(e)(1) ... cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Id.* [11] Moreover, section 9012(f) is plainly not designed to prevent evasion of the contribution prohibition incorporated in the public financing provisions since section 9012(f) places no limit whatsoever on independent expenditures by individuals.

Finally, appellants claim that section 9012(f) promotes a third goal of public financing—the elimination of any private political expenditures in presidential election campaigns. FEC Br. at 12-18; Common Cause Br. at 32-34. This purported goal also provides no basis for upholding section 9012(f). First, section 9012(f) does not eliminate private political expenditures since it (1) permits unlimited expenditures by individuals, (2) authorizes groups to spend up to $1,000 each, (3) allows substantial sums to be spent by political parties, and (4) permits unlimited sums to be spent by the institutional

[11] This Court's recent decision in *California Medical Association v. Federal Election Commission, supra,* does not depart from this aspect of *Buckley.* Rather, like *Buckley,* it holds that certain *contribution* limitations that only indirectly and incidently restrict protected First Amendment activity (such as the $25,000 overall limitation on contributions by individuals upheld in *Buckley* and the $5,000 limit on contributions to multicandidate political committees upheld in *California Medical Association*) may be sustained on the basis of the governmental interest in preventing circumvention of other, more important contribution limitations. *See California Medical Association v. Federal Election Commission, supra,* slip op. at 14-15 (plurality opinion). The *California Medical Association* opinion reaffirms *Buckley*'s holding that independent political expenditures by groups (including large, statewide associations such as the 25,000 member California Medical Association) are "constitutionally protected." *Id.* at 12.

press. Second, and more fundamentally, this Court held in *Buckley* that such an objective contravenes basic First Amendment principles. As the Court emphasized, under "our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range" of political expression. 424 U.S. at 57. Thus, Congress may not seek to suppress independent group efforts to promote a candidate's political views or electoral prospects.

2. Elimination of Corruption and the Appearance of Corruption

In addition to attempting to justify section 9012(f) on the basis of the public financing scheme embodied in the Fund Act, appellants contend that section 9012(f) serves a compelling public interest by eliminating corruption and the appearance of corruption allegedly produced by large independent expenditures in support of presidential candidates. FEC Br. at 22; Common Cause Br. at 23-29.

This Court in *Buckley* recognized that the elimination of "the actuality and appearance of corruption" is an important governmental interest. 424 U.S. at 26-27. It sustained the $1,000 contribution limitation at issue in that case on the ground that the limitation "focuse[d] *precisely* on the problem of large campaign contributions" and did not "undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues." *Id.* at 28-29 (emphasis added).

The Court, however, found the interest in stemming the reality and appearance of corruption to be an inadequate basis for upholding the $1,000 limit on independent expenditures imposed by section 608(e)(1). Each reason given for this conclusion applies with equal force here. First, the ceiling on independent expenditures imposes a "markedly greater burden on basic freedoms" of speech and association than do contribution limitations. *Id.* at 44. Second, the expenditure ceiling limits independent advocacy but does not restrict direct gifts of large sums of money to candidates or sizable expenditures

made at the direction of or in coordination with the candidate —the conduct that presents the greatest threat of real and apparent corruption. *Id.* at 45-47. As a result, the independent expenditure ceiling focuses only on activities that pose a "substantially diminished potential for abuse." *Id.* at 47. Third, even assuming that independent expenditures present a significant risk of corruption, section 9012(f), like section 608(e)(1), does not provide a meaningful response to that threat because it could easily be circumvented by individuals and groups desiring to buy influence through large independent expenditures. *Id.* at 45.[12]

In addition, section 9012(f) has other glaring deficiencies as a device for safeguarding against the corruption of presidential candidates. Unlike section 608(e)(1), section 9012(f) permits unlimited expenditures by individuals. It, therefore, does nothing to avoid corruption due to large-scale independent advocacy by wealthy individuals. In addition, again unlike section 608(e)(1), section 9012(f) has no application to presidential primary campaigns and only applies in the general election to particular candidates who are eligible for and choose to accept federal financing.[13] The limited scope and conditional

[12] To avoid serious vagueness problems, this Court in *Buckley* construed section 608(e)(1) to apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. In order to avoid the similar vagueness problems posed by section 9012(f)'s limitation on expenditures that "further the election" of a publicly-funded candidate, section 9012(f) also would have to be confined to expenditures that expressly advocate the election or defeat of clearly identified candidates. "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines [section 9012(f)'s] effectiveness ... by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder." *Buckley v. Valeo, supra,* 424 U.S. at 45.

[13] Section 9012(f) thus is even more susceptible to circumvention than section 608(e)(1). According to appellants, the primary problem addressed by section 9012(f) is the threat of corruption or the appearance of corruption presented by political professionals that head political committees and control their independent expenditures. Such seasoned professionals, of course, are well-equipped to skirt any restriction confined to express advocacy of the election or defeat of named candidates. *See* n.12, *supra.* Moreover, since

(footnote continues)

nature of section 9012(f) suggest that the provision was not even intended by Congress as a means of stemming the reality or appearance of corruption but rather was designed to limit, to some extent, the private funds available to supplement publicly funded compaigns—a constitutionally impermissible goal. *See* p. 16, *supra*. It is apparent that section 9012(f) is extremely ill-suited to serve as a safeguard against corruption of presidential candidates and thus cannot be sustained as a means of checking corruption.[14]

II. NO LIMITING CONSTRUCTION CAN FAIRLY BE GIVEN TO SECTION 9012(f) TO SAVE ITS CONSTITUTIONALITY.

Recognizing that section 9012(f) cuts far too deeply into fundamental First Amendment freedoms to be upheld, appellants seek to place a limiting construction on the section. In essence, appellants suggest that section 9012(f) applies to well-funded, nationwide organizations employing sophisticated communications techniques, but not to an amorphous class of

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(footnote continued)

section 9012(f) does not apply to presidential primary campaigns, political professionals would be free to attempt to gain or appear to gain influence with candidates through expenditures of political committees made prior to the general election.

[14] Apart from the lack of a constitutionally sufficient justification, section 9012(f) must fall because it is impermissibly both under-inclusive and over-inclusive. Section 9012(f) is under-inclusive, and thus would be ineffective, because it does not apply to expenditures—no matter how large—made directly by individuals advocating a candidate's election. Moreover, it does not apply to internal communications by labor unions, corporations or membership organizations and does not limit sums expended by owners of media entities on news stories or editorials. *See* 2 U.S.C. §§ 431(8)(B)(vi), (9)(B)(i), (9)(B)(iii), 441b(b)(2)(A). At the same time, the section is sweepingly over-inclusive in addressing the purported threat posed by 1 professional "fundraisers" (Common Cause Br. at 26-29) because it applies to all groups, regardless of their structure or mode of operations. Groups that are run by political neophytes or by committees do not pose the supposed threat focused upon by appellants but still would be silenced by section 9012(f)'s expenditure ceiling.

smaller, less formal, less effective committees. This interpretative effort to save the constitutionality of section 9012(f) is fundamentally misconceived.

A. The Excessive Scope Of The Statutory Language Is Clear.

Common Cause asserts that section 9012(f) does not limit expenditures by "informal groups of persons acting together directly on their own behalf." Common Cause Amended Complaint, ¶ 2, Common Cause J.S. App. at 71a; *see* Common Cause Br. at 12, 35. Similarly, the Federal Election Commission—in direct contradiction of its own regulations—contends that the provision does not apply to "a group of individuals making expenditures to amplify their voices in support of a publicly financed candidate so long as the individual participants retain control over their funds." FEC Br. at 45 & n.66; *see* FEC J.S. at 19.[15] Nothing in the language of section 9012(f) supports the limiting construction advanced by appellants.

The broad definition of "political committee" in 26 U.S.C. § 9002(9) is all-encompassing: "*any* committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence" any federal, state or local election. This broad definition admits of no distinction between informal, close-knit associations and sophisticated, broad-based organizations. As the court below noted, this definition of political committee "is roughly the same as the definition of that term" in the Campaign Act—a definition that expressly encompasses any "group of persons." *See* Common Cause J.S. App. at 3a-4a n.2; 2 U.S.C. § 431(4)(A).

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[15] In acknowledging that the First Amendment does not permit restrictions on group expenditures when the individual members retain control over their own funds, the Federal Election Commission effectively concedes that the $5,000 contribution limitation in 2 U.S.C. § 441a(a)(1)(C)—the provision at issue in *California Medical Association v. Federal Election Commission, supra*—cannot be applied to bar the pooling of funds by individuals for independent group expenditures. This position was urged by the ACLU in its *amicus* brief submitted in the *California Medical Association* case, but the issue was not decided by the Court. *See* slip op. at 14 n.17.

The Federal Election Commission's own regulations recognize this sweep and require the rejection of the novel interpretation of "political committee" urged by appellants. Regulations adopted by the Commission in June 1980 state that the term "political committee," as employed in section 9012(f), reaches "*any* committee, club, association, or *other group of persons.*" *See* 11 C.F.R. §§ 100.5, 9002.9 (1981)(emphasis added). As the Commission explained at the time it promulgated these regulations, this definition is "in concert with the definition of political committee in Title 2 [the Campaign Act]." 45 Fed. Reg. 43371, 43372 (1980). In their efforts to persuade this Court to adopt a limiting construction of section 9012(f), appellants inexcusably omit any mention of the Commission's own regulations that explicitly define the coverage of the section in the broadest possible terms.[16]

In sum, the limiting construction proposed by appellants is without foundation in either the language or the administrative interpretation of the section.[17] This belated effort at wholesale redrafting cannot save section 9012(f).

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[16] Instead of informing this Court of its own controlling regulations, the Federal Election Commission strains to transform language in an irrelevant advisory opinion into support for its tortured reading of the provision. *See* FEC Br. at 45 n.66, *quoting* Advisory Opinion No. 126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577, at 10,713 (1980). That advisory opinion, which involves the "political committee" provision in the Campaign Act rather than the Fund Act provision, actually attempts to *expand* the scope of the definition by concluding that an individual who solicits funds from others for political purposes comes "within the definition of a political committee as 'any other group of persons.'"

[17] Contrary to the assertion of Common Cause (Common Cause Br. at 35 & n.60), the legislative history does not support the limiting construction urged by appellants. The House and Senate conference reports reveal that prior to conference the bills placed a $1,000 ceiling on *all* expenditures in support of a presidential candidate who accepted federal funding. S. Rep. No. 553, 92d Cong., 1st Sess. 57 (1971); H.R. Rep. No. 708, 92d Cong., 1st Sess. 57 (1971). The bills were amended in conference to eliminate the limitation on expenditures by individuals and to make clear that the limitation on organizations did not apply to broadcasting organizations, periodicals, or tax-exempt organizations reporting to their members. S. Rep. No. 553, *supra*, at 58; H.R. Rep. No. 708, *supra*, at 58. The conference reports do not contain any reference to or provide any support for an exception for organizations in which the individual members retain control over their funds. S. Rep. No. 553, *supra*, at 56-59; H.R. Rep. No. 708, *supra*, at 56-59.

B. The Definition Of "Political Committee" Proffered By Appellants Is Unconstitutionally Vague.

Even if section 9012(f) meant what appellants now assert it does, their interpretation would not save the constitutionality of the provision. The introduction of the fuzzy distinctions conjured by appellants would simply add to the other failings of the provision by rendering it unconstitutionally vague.

The Fifth Amendment requirement of due process leaves no room for vague or imprecise criminal laws. The imperatives of due process are even stronger where, as here, First Amendment interests are implicated. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). As the Court has emphasized, vague laws trap the innocent by failing to provide fair warning and operate to inhibit protected expression by inducing citizens to "steer far wider of the unlawful zone" than "if the boundaries of the forbidden areas were clearly marked." *Buckley v. Valeo, supra*, 424 U.S. at 41 n.48; *see, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

The limiting construction proposed by appellants would violate these well-established precepts. The only "standard" proffered by appellants—whether the individual participants in the group "retain control over their funds"—fails to provide a clear guide that persons working as part of a political organization could use to determine whether they are free to engage in unlimited expenditures for political expression or are in danger of being subjected to criminal sanctions under section 9012(f) for any expenditure in excess of $1,000. *See* FEC Br. at 45 n.66. Appellants' "standard" fails to specify where, on the continuum between a multi-million dollar media campaign funded by a nationwide committee with thousands of adherents and a political pamphlet drafted and funded jointly by a handful of like-minded neighbors, individual adherents yield enough "control" to others so that the group becomes subject to section 9012(f)'s criminal penalties.

The proposed construction of section 9012(f) would create a trap for the innocent and raise a serious danger of arbitrary application. It would also deter many organizations from participating in the political process.[18] Thus, the wholly amorphous, undefinable line between "informal groups" and "political committees" espoused by appellants lacks the precision and clarity required by both the First and Fifth Amendments.

C. Appellants' Limiting Construction Does Not Alleviate Section 9012(f)'s Impermissible Restriction Of Protected Political Expression.

Beyond these deficiencies, appellants' salvage effort rests on a fundamental misunderstanding of the First Amendment. It assumes—erroneously—that the First Amendment permits restrictions on independent political expression by associations when the restrictions are pegged to the effectiveness of the organization or the control of the organization's members over and the extent of their participation in shaping the content of the organization's political expression. Nothing could be more foreign to the First Amendment. *See* pp. 10-11 *supra.*

The free speech rights of individuals and groups alike extend to "vigorous" advocacy no less than to abstract political discussion. *Buckley v. Valeo, supra,* 424 U.S. at 48. The size of the group or its expenditures—and hence the strength of the group's voice—cannot provide a legitimate basis for regulation. As the district court pointedly observed: "Since it is beyond contention that individuals and 'informal groups' may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groupings of like-minded individuals." Common Cause J.S. App. at 16a (emphasis in the original). *Accord, Consolidated Edison Co. v. Public Service Commission, supra,* 447 U.S. at 533; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 776-78.

[18] Contrary to the Federal Election Commissions's suggestion, FEC Br. at 20 n.21, the dangers of vague criminal laws are not alleviated by the normal culpability requirement that the violation be "knowing" and "willful."

Appellants' construction of section 9012(f) would deny First Amendment rights of free expression to all mass associations, since it would be impossible for all or even most of the supporters of such organizations jointly to draft its political communications or to review and comment on them before they are made. Section 9012(f), as construed by appellants, thus would prevent most organizations from "effectively amplifying the voice of their adherents"—"the original basis for the recognition of the First Amendment protection of the freedom of association." *Buckley v. Valeo, supra,* 424 U.S. at 22, *citing NAACP v. Alabama,* 357 U.S. 449, 460 (1958). Yet associations with numerous adherents have as much right as tiny, informal groups to engage in free political expression.[19]

In sum, the philosophical premise underlying appellants' limiting construction—that political expression can be regulated if it has mass support or promises to be sufficiently effective—rests on a misguided view of the First Amendment. What appellants evidently perceive as an abuse to be remedied is exactly what the First Amendment is intended to safeguard from government encroachment. This Court should firmly reject the novel theory of political free speech urged by appellants.[20]

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[18] Contrary to the Federal Election Commissions's suggestion, FEC Br. at 20 n.21, the dangers of vague criminal laws are not alleviated by the normal culpability requirement that the violation be "knowing" and "willful."

[19] Section 9012(f)'s limitation on the right of organizations to engage in political advocacy "is simultaneously an interference with the freedom of its adherents," *Sweezy v. New Hampshire.* 354 U.S. 234, 250 (1959) (plurality opinion), who often have no alternative means of participating effectively in the political process. *See* p. 8 *supra.*

[20] Contrary to Common Cause's assertion, there is no need for a remand for development of a more detailed record. Common Cause Br. at 41-44. As with the expenditure limitations found unconstitutional in *Buckley,* section 9012(f)'s drastic restraint on fundamental First Amendment freedoms is apparent from the language of the provision and requires that it be declared unconstitutional on its face.

CONCLUSION

For the reasons stated, the judgment of the district court declaring 26 U.S.C. § 9012(f) unconstitutional should be affirmed.

Respectfully submitted.

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